

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

HUBERT L. ELLIS)	
Claimant)	
VS.)	Docket No. 157,393
)	
DATA DOCUMENTS, INC.)	
Respondent)	
AND)	
)	
THE HARTFORD INSURANCE COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

The Kansas Workers Compensation Fund appeals from an Order Denying Dismissal entered by Administrative Law Judge Robert H. Foerschler on September 25, 1996. The Appeals Board heard oral argument on March 18, 1997 in Kansas City, Kansas.

APPEARANCES

Claimant, having settled its claims against respondent, appeared not. Respondent and its insurance carrier appeared by their attorney Christopher T. Wilson of Overland Park, Kansas. The Kansas Workers Compensation Fund appeared by its attorney Gary L. Jordan, Ottawa, Kansas.

RECORD AND STIPULATIONS

The Appeals Board considered the documents, pleadings and correspondence contained in the administrative files for these docketed claims including the transcript of the September 6, 1991 Settlement Hearing, and the July 9, 1996 Motion Hearing.

The issues as between claimant and respondent were settled on September 6, 1991. However, the Workers Compensation (Fund) did not stipulate to the reasonableness of the settlement and all issues as between respondent and Fund were reserved. Thereafter, on May 31, 1996, a prehearing settlement conference was set for July 24, 1996, but subsequently canceled by respondent following the hearing on the Fund's Motion to Dismiss. No stipulations were taken in this matter as between respondent and the Fund.

ISSUES

The issues for determination by the Appeals Board concern the applicability of K.S.A. 1996 Supp. 44-566a(c)(3), specifically: (1) whether the new statutory enactment of K.S.A. 44-566a(c)(3) should be applied retroactively; (2) whether the liability of the Fund was established within five years of the date of the employee filing a written notice of claim; and (3) whether respondent has shown just cause for this case to be left open.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record and having considered the briefs and arguments of counsel for the parties, the Appeals Board finds that the Order Denying Dismissal entered by the Administrative Law Judge should be affirmed.

The Appeals Board agrees with the Administrative Law Judge's findings of fact and conclusions of law enumerated in said Order. The Appeals Board specifically agrees with the Administrative Law Judge's finding that although its intent is not expressly stated therein, the legislature could not have intended other than for the provisions of K.S.A. 1996 Supp. 44-566a(c)(3) to be applied retroactively. In applying said statute, the Appeals Board further agrees with the Administrative Law Judge that respondent has met its burden of showing just cause for its claim against the Fund to be left open.

For the purpose of determining whether the Fund's liability was established within five years of the date the employee filed written notice of claim, the Appeals Board finds the date "written notice of claim" was "filed" means the date an application for hearing was filed with the director as contemplated by K.S.A. 44-534. In this docketed claim, claimant's applications for hearing was filed with the director on July 8, 1991. As of June 18, 1996, when the Fund filed its Motion For Dismissal pursuant to K.S.A. 1996 Supp. 44-566a (c)(3), this case had not been submitted to the Administrative Law Judge for decision. The regular hearing had not been started, stipulations had not been taken and the issues had not been established. Furthermore, terminal dates for the presentation of evidence had not been set and neither party had presented its evidence. See K.S.A. 44-523; K.A.R. 51-3-1;

K.A.R. 51-3-5; and K.A.R. 51-3-8. The Appeals Board finds that the liability of the Fund was not established within five years of the date the employee filed a written notice of claim. In this case the five years would expire July 8, 1996.

The Appeals Board agrees with the Fund's contention that respondent had ample time to finalize and submit its case against the Fund between the time of the settlement of this case with the claimant on September 6, 1991 and the April 4, 1996 effective date of the statutory amendment. The Appeals Board disagrees with respondent's assertion that it "had done everything possible to determine the Fund's liability prior to the expiration of the five (5) year period provided in K.S.A. 44-566a(c)(3)." Nevertheless, because the amendments to K.S.A. 44-566a constitute a new procedural requirement for expediting claims against the Fund, some leniency should be given to respondents initially to permit them an opportunity to pursue those cases which have been gathering dust. Heretofore, there was no provision for dismissal of those claims for failure to prosecute. Furthermore, had the Fund wanted to clean these cases from the inactive docket, the Fund was always able to set them for regular hearing and ask for terminal dates to be established for the completion of the evidentiary record. That was not done and it was not until after respondent requested a prehearing settlement conference that the Fund filed its Motion For Dismissal.

There is little difference factually between this case and the case of Nispel v. Thomasbrook Apts, Docket No. 143,399 as to the applicability of K.S.A. 44-566a(c)(3). The reason given by the Administrative Law Judge for the different results in these two cases is that in this case the party with the burden of proof, namely respondent, initiated steps to proceed with the presentation of its case a little sooner after the effective date of the amendments to the statute than did respondent in Nispel. Moreover, in this case respondent's actions to prosecute this claim in May 1996 preceded the expiration of the five-year period contemplated by the statute. We think the Administrative Law Judge's ruling is consistent with the result intended by the legislature when it enacted K.S.A. 44-566a(c)(3). Furthermore, a reasonable period of time should be permitted after the April 4, 1996 effective date of the amendments to the statute for the parties to complete their records and submit the cases for decision. When determining whether there has been a showing by a party that the case should be left open, the trier of fact should look not only to what action was taken on the case before the expiration of the five-year period contemplated by the statute, but may also look to what action was taken after the April 4, 1996 effective date of the statute and the date of the Fund's motion to dismiss under K.S.A. 1996 Supp. 44-566a(c)(3). Here, the Appeals Board finds that respondent did take steps to pursue its claim against the Fund and there is just cause for leaving this case open.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order Denying Dismissal entered by Administrative Law Judge Robert H. Foerschler dated September 25, 1996, should be, and is hereby, affirmed and this docketed claim shall remain open before the Administrative Law Judge for further proceedings on the remaining issues concerning the Fund's liability.

IT IS SO ORDERED.

Dated this ____ day of March 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Christopher T. Wilson, Overland Park, KS
Gary L. Jordan, Ottawa, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director